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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1904.

No. 153.

THE UNITED STATES,
Appellant,

vs.

JAMES STINSON, HENRY J. STINSON AND MICHAEL S. BRIGHT, AS RECEIVER OF JAMES STINSON,
Appellees.

Special Brief for Appellees.

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Of Counsel for certain creditors of
James Stinson.

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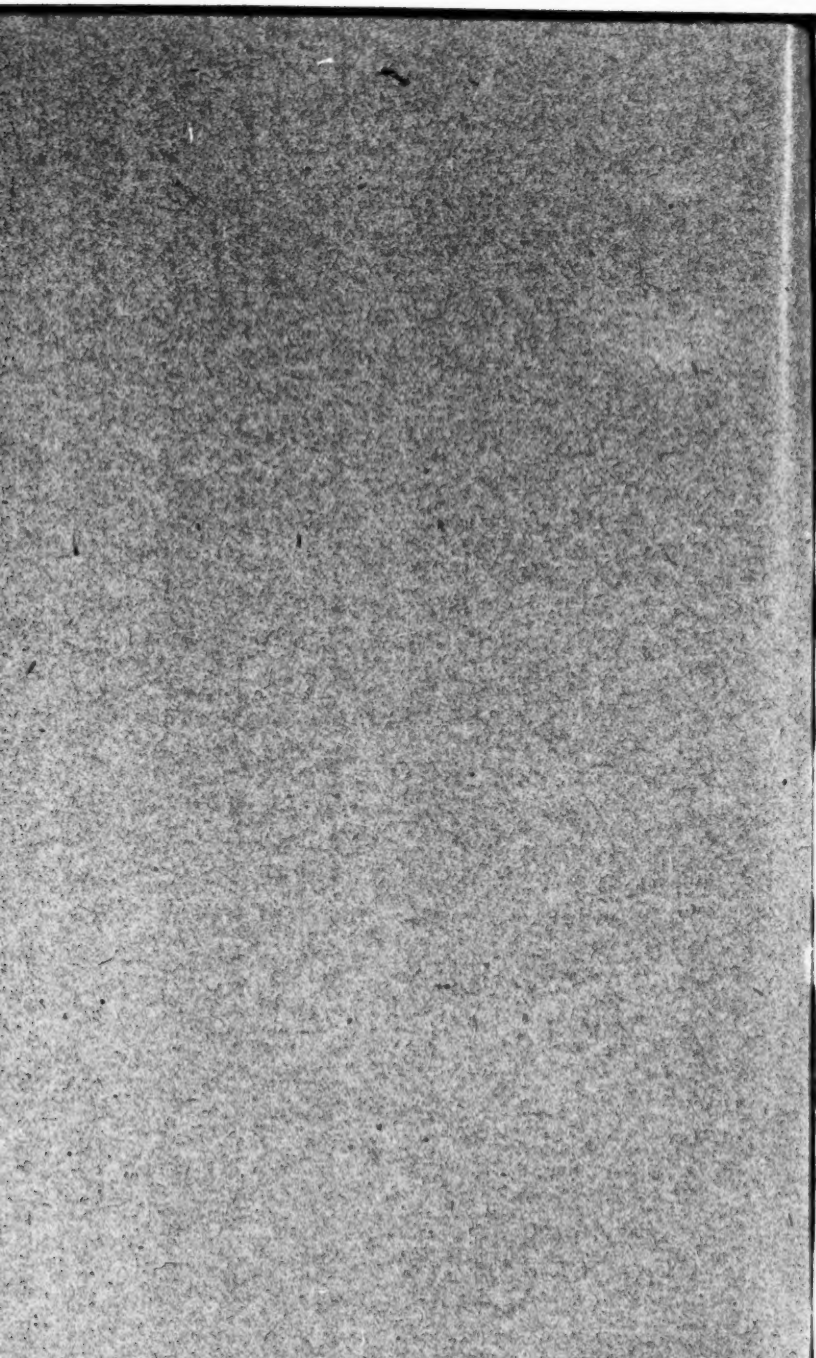

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SPECIAL BRIEF FOR APPELLEES.

In availing ourselves of the courtesy of counsel, evidenced by their stipulation on file, to file a brief on behalf of certain Canadian creditors of James Stinson in support of the decree in this case, we shall not undertake a general discussion either of the facts or the law, but having first noted the relation of these creditors to the controversy and their claims to equitable consideration, we shall endeavor to present to the Court a certain phase of the case and certain rules of law applicable thereto, which we believe will at least strongly reinforce the argument of the leading counsel for appellees.

THE RELATION OF STINSON'S CREDITORS TO THIS CONTROVERSY.

A reference to pages 488 to 491 of the transcript of record will show that the order entered by the Circuit Court in this cause April 11, 1900, permitting Michael S. Bright as receiver of the defendant James Stinson to intervene as a party defendant, was based upon the petition of said Bright, alleging, among other things, that the indebtedness of James Stinson comprises about Two Hundred and Fifty Thousand Dollars ($250,000), due to depositors at Hamilton, Ontario, besides other claims, to the amount of about Three Hundred Thirty-eight Thousand Dollars ($338,000), of which latter about Two Hundred Fifty-four Thousand Dollars ($254,000) is secured by mortgages or pledges; that, in addition to this indebtedness, there is about Two Hundred Thousand Dollars ($200,000) due and unpaid for taxes upon the lands of Stinson, and that the lands embraced in this controversy constitute the main part of the assets available for the payment of his creditors, so that if it be finally decided that the patents for these lands must be set aside, the unsecured creditors will receive little or nothing upon their claims. These allegations are found by the Circuit Court to be true. It is obvious, therefore, that this controversy is one in which the parties most vitally interested for the defense are the unsecured creditors of James Stinson.

The character of this indebtedness does not very clearly appear in the record, but as to the Hamilton creditors whom we represent, it is perhaps sufficiently indicated by the word "*depositors*" to justify the court in presuming what the record in the receivership shows, that it comprises the claims of a large number of small depositors in a private bank owned by Stinson.

While these facts may not be sufficient to place these creditors in the category of *bona fide* purchasers, yet it is submitted that in view of the very long period which has been permitted by the government to elapse before the assertion of its present claims, they do raise strong equitable grounds for assimilating the position of these creditors to that of *bona fide* purchasers without notice, and for not depriving them of these lands unless the court shall find itself compelled to such a decree by considerations from which it can not escape. If not in a technical sense *bona fide* purchasers, they are within the spirit and reason of the rule upon which the equitable doctrine of protection to *bona fide* purchasers is founded. They are innocent creditors.

We now pass to a consideration of certain legal aspects of the case as it is here presented.

The Present Contention of the Government.

The grounds upon which it is now contended by counsel for the government that the decrees of the lower courts should be reversed and a decree entered by or under the direction of this court, setting aside and annulling the patents in question, are that these patents were procured by means of a fraudulent agreement entered into between James Stinson and the fourteen entrymen named in the bill, by which the title to these lands was to be acquired from the United States for Stinson's benefit, and that this agreement involved two distinct, fraudulent acts or series of acts on the part of each of the entrymen, in violation of the statutes governing the acquisition by pre-emption of the public lands. These may be stated in general terms as follows:

1. False representations, and false proofs made and presented to the land office in respect of the extent and char-

acter of settlement, improvement and other requirements of sections 10 and 12 of the act of 1841.

2. The making and presentation to the register and receiver of false affidavits designed to meet the requirements of section 13 of that act in respect particularly of those provisions intended to preclude agreements for the acquisition of title by the entrymen for the benefit of some third party.

It is now claimed by counsel for the government that the evidence establishes fraudulent violations of both of these sets or series of statutory requirements.

Section 10 is substantially similar to Rev. Stat. sections 2259–61; Sec. 12 to Rev. Stat. 2263. Section 13, though similar in general purpose to Rev. Stat. 2262, differs somewhat, and we therefore give from the original so much as has any bearing on this controversy.

Section 13. That before any person claiming the benefit of this act shall be allowed to enter such lands, he shall make oath before the receiver or register of the land district in which the land is situated, (who are hereby authorized to administer the same) that he has never had the benefit of any right of pre-emption under this act; that he is not the owner of 320 acres of land in any state or territory of the United States, nor hath he settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use or benefit; and that he has not directly or indirectly made any agreement or contract in any way or manner with any person or persons whatsoever by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said land and all right and title to the same; and any grant or conveyance which he may have made except in the hands of *bona fide* purchasers for a valuable consideration shall be null and void.

The Case Made by the Bill.

Without discussing the evidence upon these points—for even if such a discussion were not outside of our present purpose we could not hope to add anything to what is said by the leading counsel for defendants in their brief—we desire now to call the attention of the court particularly to the rule which declares that no matter how strong may be the evidence in support of any particular fact, the court is precluded from its consideration unless it has a proper basis in the pleadings of the party in whose favor it is invoked. As said by the Supreme Court in

Washington R. R. v. *Bradley*, 10 Wallace, 299,

"It is hardly necessary to repeat the axioms in the equity law of procedure that the allegations and proofs must agree; that the court can consider only what is put in issue by the pleadings; that averments without proofs, and proofs without averments are alike unavailing."

It is believed that the allegations of the bill are insufficient to raise a distinct issue upon the question whether the entries which it is sought to annul in this case were effected by means of fraudulent representations and proofs respecting inhabitancy, settlement, improvement, and the other requirements of sections 10 and 12 of the act, and that all the evidence introduced by the complainant upon that point is wholly immaterial and irrelevant, and can not properly be considered by the court except in so far as it tends to establish the existence of an agreement between Stinson and the entrymen for the acquisition of title for his benefit, and therefore except in so far as it tends to establish a violation of the provisions of section 13 of the act.

After setting out in general terms the employment of the entrymen by Stinson to pre-empt and procure the title to these lands for him, the bill proceeds to set forth in detail, in

respect of each one of these fourteen entrymen, the various steps by which it is alleged the object of this employment was accomplished. The allegations in respect of the first, John Johnson (Trans. p. 2), may be taken as representative of all the others. So far as relates to the question of settlement, improvement, etc., they are as follows:

That Johnson filed in the land office of the district wherein the lands were situated

"a written statement, describing said lands and falsely and fraudulently alleging that he had within thirty days theretofore made a settlement thereon in person, and declaring his intention to claim the same under the pre-emption laws of your orator. * * * And that within twelve months after such alleged settlement thereon he falsely and fraudulently made oath and affidavit before the receiver or register of said land district that he had made such settlement in person upon the said lands and inhabited and improved the same and erected a dwelling house thereon, and continued to reside thereon ever since the making of such settlement and cultivated a portion thereof, and that he had so resided thereon such time and so cultivated such a portion thereof as were necessary and required to authorize and entitle him then to enter the same with the register of such land office upon paying to your orators the minimum price thereof."

The rest of this paragraph relates to the affidavit submitted by the entryman under section 13 to the effect that he had never had the benefit of any right of redemption; that he was not the owner of 320 acres of land in any state or territory, and

"that he had not so settled upon and improved the last said lands to sell the same upon speculation, but in good faith to appropriate the same to his own exclusive use, and that he had not directly or indirectly made any agreement or contract in any way or manner with any person whatsoever by which the title which he might acquire thereto from your orators should inure in whole or in part to the benefit of any person except himself."

The bill then proceeds (page 3):

"That the defendant James Stinson, for the purpose of procuring such entry of said lands, prior to such entry thereof, in corroboration of the statements and oaths of the first said John Johnson made as aforesaid, procured the false and fraudulent affidavits of other witnesses that the first said John Johnson had so settled and resided upon and improved the said lands, and filed the same with said register and receiver, and made false and fraudulent proofs of such settlement and improvement thereof by the first said John Johnson to the satisfaction of the register and receiver of said land district agreeable to the rules prescribed by law and the Secretary of the Interior relative thereto."

It is then further averred that such false statements, oaths, affidavits and proofs were received by the said register and receiver of said land office, and by them believed to be true, and thereupon said receiver received from Johnson, and he with money of the defendant Stinson, and by his direction, paid to the receiver the minimum price of said lands, being the amount of money necessary to perfect his pre-emption claim, and the register and receiver thereupon issued him a patent certificate therefor.

Upon examining the statute, section 12, the court will observe that proof of the settlement and improvement required by the provisions of the act "shall be made to the satisfaction of the register and receiver of the land district in which such lands may lie, agreeably to such rules as shall be prescribed by the Secretary of the Treasury" (subsequently Secretary of the Interior).

Thus far it would seem that the averments of the bill in relation to the proofs of settlement and improvement are wholly insufficient in at least two respects:

1. They merely characterize the statements and proofs made and submitted by the entryman in general terms as false and fraudulent, without any specification, such as is required by the elementary rules of pleading, showing the

particulars in which they were false and fraudulent. Especially where fraud is charged is certainty of allegation required.

2. Whatever may be meant by the somewhat remarkable allegation that Stinson made false and fraudulent proofs of such settlement and improvement "to the satisfaction of the register and receiver of said land district, agreeable to the rules prescribed by law and the Secretary of the Interior relative thereto"—which would seem to imply a somewhat unwarrantable imputation upon the Secretary of the Interior, if not upon the register and receiver—in view of the circumstance that entry proofs were by the statute required to be made "agreeably to rules and regulations prescribed by the secretary," and of the further fact, of which the court will take judicial notice, that such rules were in fact prescribed, it would seem particularly necessary that the bill should specify in what particulars the proofs violated, not only the statute, but the regulations prescribed by the Secretary of the Interior. Let us see, then, if these defects and omissions are anywhere supplied.

After a repetition of the foregoing averments in substantially the same language in reference to each of the fourteen entrymen, the bill (page 19) proceeds as follows:

"That each and every and all such statements, oaths, affidavits and proofs so made in and about such pre-emption and entry and patenting of said lands, and each and every tract and portion thereof, were false and frandulent, and that the defendant James Stinson hired and procured the same to be made, and each and every of them, well knowing them to be so false and fraudulent."

Here is still nothing but what has been aptly called "mere vituperation." But now the bill proceeds:

"That neither of said persons so entering the several portions of said lands had previously thereto so settled upon, inhabited, cultivated, improved or resided upon such por-

tion thereof so claimed and entered by him, and neither ever erected a dwelling thereon, and that neither of them so claimed, pre-empted, and entered upon such portions of said lands so claimed, pre-empted and entered by them, respectively, *in good faith to appropriate the same to his own exclusive use, as the defendant James Stinson always well knew, but that each and every of them so claimed, pre-empted and entered and procured such patents to the same, and did every said act and thing by him done relating thereto, for hire, paid him by the defendant James Stinson, and as his servant, and with the intent and end and agreement, contract and understanding with the defendant James Stinson, that the title which he should so acquire thereto from your orators, should be so conveyed to the defendant James Stinson and inure to his benefit,* and that each and every act and thing so done in and about such pre-emption, entry and procuring of such patents by said persons so procuring the same, respectively, was so done by them, and each and every of them, at the instance and request, and by the procurement and direction of the defendant James Stinson."

The italics are ours.

Now we call the attention of the court to the fact that in the averments upon page 2 of the statements and affidavits which it is alleged were submitted by Johnson to the land office under the procurement of Stinson, the pleader has undertaken to follow the language of the several sections of the statute involved, and that in the averment that one of the alleged false and fraudulent affidavits stated "that he had not settled upon and improved the said lands to sell the same on speculation, but in good faith to appropriate the same to his own exclusive use," etc., the pleader was following the language of section 13, which is the section relating, not to the requirements for settlement and improvement, but to the requirement of an affidavit that what was done was in good faith for the benefit of the entryman, and not for the benefit of some third party. If now, in the light of this fact, the court will consider attentively the last paragraph which we have quoted from the bill (page 19), in

which some attempt is made to specify particulars in which the proofs submitted were false and fraudulent, it will be observed that these allegations manifestly relate, not to the proof submitted under sections 10 and 12, but to the proof submitted under section 13, as is evident from the language employed to assert the truth of the contrary proposition, that is to say: The allegation of this paragraph is in effect that these acts were not done in good faith to appropriate the land to the exclusive use of the entrymen, as Stinson always very well knew, *but* that each and every of them pre-empted and entered the land, and did every act and thing by him done relating thereto for the benefit of Stinson. If these allegations are sought to be referred to sections 10 and 12 they are plainly insufficient as specifications of fraud. It is not alleged that the entrymen never made any settlement nor that they had never cultivated the lands *at all*, etc.; the averment, grouping all these requirements together, is in the argumentative form indicated by the qualifying word "so"—alleging that neither had "so" settled upon, etc., the portion claimed by him, which naturally introduced and might perhaps be sufficient as introductory to that part of the paragraph which we have italicized, thus making it an averment that these things had not been done "*in good faith*," etc. At all events, it is only by referring them to section 13 that they have any legal sufficiency, and it was probably that section which the pleader had in mind in framing this paragraph.

This view of the intent and meaning of the bill gets further confirmation from the fact that no allusion is made in this part of the bill to the rules and regulations prescribed by the Secretary of the Interior for making proofs under sections 10 and 12, whereas, had it been the purpose of the pleader to rely upon specific frauds in respect of the require-

ments of those sections, we should expect to find, and it would seem necessary that the bill should contain, specifications of fraudulent violation or evasion of those rules and regulations.

It is therefore submitted that the only substantial basis for this bill must be found in the alleged violation of some provisions of Section 13 of the Act of 1841.

THE PROVISIONS OF SECTION 13 OF THE ACT OF 1841.

We now invite the attention of the court to this section, to its requirements, and to the penalties imposed for their violation.

So far as the provisions of this section which are involved in the present case are concerned, it is evident that they are designed to prevent anticipatory agreements for the transfer to third parties of the title to be acquired under the provisions of the act, but we desire to call particular attention to some of the features of those provisions.

1. WHAT IS THE WRONGFUL ACT DENOUNCED BY THIS SECTION?

The section does not in terms forbid the settlement of the lands for purposes of speculation nor the making of anticipatory agreements for the transfer of the title to be acquired under the Act. The particular thing against which the penalties of the Act are directed is the making of a false affidavit in respect of these matters.

It is important to note, in this connection, that there is absolutely nothing of which any *intrinsic* fraud or wrong could be predicated in those things the doing of which is here required to be disavowed by the affidavit of the entryman. It is not intrinsically wrong or fraudulent to settle upon public lands for the purposes of speculation, or to acquire the title thereto for the purpose of selling it, or to make an

agreement for the transfer to a third person of the title to be acquired by pre-emption. It is well known that these things were common before the enactment of the statute, and while it was doubtless the purpose of the statute to prevent them, this was not because they were fraudulent or wrong, but because they were against the policy which the government then adopted, in reference to the settlement and disposition of the public domain; and it must be conceded by counsel for the government, in view of the decisions cited by the leading counsel for appellees, that while an agreement for sale of the title to be acquired, made five minutes before the entry, might preclude the entryman from truthfully making the required affidavit, and if such affidavit were made, expose him to forfeiture of land and money, such an agreement, made five minutes after the entry was completed, would be perfectly valid and unassailable.

The wrongful act, then, which is denounced by this statute, is the making of a false affidavit, or, in the language of the statute, "swearing falsely in the premises."

Suppose the statute, in pursuance of a somewhat different purpose, had provided that the affidavit to be filed by the entryman should state whether or not he had made any agreement for the transfer of the title to be acquired by him, and that if he had made such an agreement, it should state the terms thereof and the person with whom made, the penalties of the statute remaining as at present; could there be any doubt that those penalties would attach, not to the making of any particular agreement, but to false swearing in respect thereof?

2. The Penalties Provided by This Section.

a. The pains and penalties of perjury. It is a criminal offense; made such by this statute.

b. Forfeiture of the money paid for the land and all right and title to the land.

c. Any grant or conveyance of the land made by the entryman except in the hands of *bona fide* purchasers and for a valuable consideration, null and void, thus exposing the grantee to the penalty of forfeiture.

Here, then, it seems to us, in the alleged violation of this statute, must be found whatever substantial basis there is for the present bill. Except for the provisions of the statute, it could hardly be claimed that the government has been defrauded of its lands. It has received all it asked for the lands, its full price, and apart from the statute, no fraud has been committed, no wrong done in the acquisition of the title. The alleged offense is *malum prohibitum*, not *malum in se*. That the framer of the bill regarded it as based upon the statute and not upon any intrinsic fraud, is indicated by the fact that no tender is made of the purchase money.

This view, we think, finds approval in what is said by the Supreme Court in the case of *U. S.* v. *Trinidad Coal Co.*, 137 U. S. 161.

That case came before the court on a demurrer to a bill filed to set aside certain patents for coal lands alleged to have been acquired in contravention of the provisions of the statute limiting the quantity of such lands which could be entered by one person or association. One ground of demurrer alleged was "that the bill is defective in not containing a distinct offer to refund the moneys which it is

alleged were furnished by the defendant to the several persons to whom patents were issued."

No forfeiture of either land or money was specifically provided by the statute upon which that bill was based, yet the court, in holding that no offer to refund was necessary, said, *arguendo*,

"The controlling object of this and similar suits is to enforce a public statute against those who have violated its provisions. * * * According to the allegations of the bill, which are admitted to be true, the defendant is a wrongdoer against whom the government seeks to vindicate its policy in reference to the development of its vacant coal lands."

All of which applies with greater force to the present case, in which, by the express terms of the statute, the penalty for its violation is the forfeiture of lands and money. This provision is certainly not self-executing, and after patent issued it would seem that a bill in equity would be the only effective means of enforcing it.

Upon this point, then, our contention is that this bill is to be regarded as filed for the express purpose of enforcing the forfeiture declared by this section as one of the penalties provided for the offense therein denounced.

Degree of Proof Necessary.

If the foregoing view of the nature of this suit be sound, it must control the court in its consideration of the evidence by which the government has sought to establish its case; and here we invoke a rule well settled in federal tribunals, viz:

WHERE, ALTHOUGH THE PROCEEDING IS IN FORM A CIVIL ONE, THE EFFECT OF THE JUDGMENT OR DECREE IS TO FASTEN UPON THE DEFENDANT A CRIMINAL VIOLATION OF THE LAW, ESPECIALLY OF A STATUTE THE PENALTY FOR WHICH IS PUN-

ISHMENT AS FOR A CRIME OR A DIRECT FORFEITURE OF PROPERTY, OR BOTH, OR SPECIAL STATUTORY DAMAGES, THE COMPLAINANT, WHETHER THE GOVERNMENT OR A PRIVATE PERSON, MUST ESTABLISH ITS CASE WITH THE SAME DEGREE OF CERTAINTY WHICH IS REQUIRED IN CRIMINAL PROCEEDINGS. THE PRESUMPTION OF INNOCENCE MUST BE OVERCOME, NOT MERELY BY A PREPONDERANCE OF THE EVIDENCE BUT BY PROOF WHICH LEAVES NO REASONABLE DOUBT OF GUILT.

We are aware that in the state courts there has been and undoubtedly is much contrariety of opinion upon this proposition, yet some of these tribunals hold with great strictness to the rule above stated.

Thayer v. *Boyle*, 30 Me. 475.

Trespass for willfully and maliciously setting fire to and burning and destroying plaintiff's barn with its contents. Action brought under a statute prescribing punishment in the county jail and by fine, and also liability to the person injured in treble damages.

The presiding judge instructed the jury that in examining the case they should decide upon the balance of testimony as in other civil cases, and that the defendant was not entitled to a verdict in his favor upon merely raising a reasonable doubt, as would be the case in a criminal prosecution. Verdict for plaintiff, and defendant appealed. The Supreme Court, after holding that the remedies provided by this statute were entirely irrespective of the penalties provided by the criminal code for the offense of arson, proceeded to consider the instruction of the trial court as to the *quantum* of proof necessary, and among other things said (page 483):

"The case of *Oliver* v. *Gibson*, decided by this court in 1847, was a suit under the statute for willfully disclosing falsely as a debtor who had given a bond to his creditor

upon arrest on execution. It was held that the jury could not return a verdict in favor of the plaintiff unless the evidence of false swearing in the disclosure was such as is required on the trial of a person indicted for perjury, although the jury may have been satisfied, without such amount of evidence, that the defendant was guilty."

"The defendant was charged with having willfully and maliciously done acts constituting an aggravated offense against society and the laws of the land. If prosecuted criminally he was exposed to be deprived of his liberty. If held responsible in this form of prosecution, the penalty in the way of damages is a sum equal to three times the value of the property destroyed. The effect upon his reputation and standing in the community by a recovery in this case, would be perhaps very little less than upon conviction for the same on indictment. Until legally proved guilty to the satisfaction of a jury, he is shielded by the presumption of innocence. This protection can not be taken away by evidence establishing only a probability of guilt, however strong that probability may be, if it amounts to nothing more. A preponderance of proof which does not satisfy the mind can do nothing further than to render the fact in controversy probable. To dislodge the presumption of innocence, the plaintiff was bound to satisfy the jury of the truth of the charge. We have seen that this was not done so long as a reasonable doubt remained in their minds. On this branch of the case the instructions were not so favorable as the defendant had a right to require. Exceptions sustained."

Laughran v. *Kelly*, 62 Mass. 199.

We quote from the syllabus:

"A special action on the case under the statute against one summoned as trustee in foreign attachment for knowingly and willfully answering falsely upon his examination on oath, can not be maintained on the testimony of one witness only, to the falsity of the answer, but the same amount of evidence is required as would be necessary to convict the defendant of perjury."

The report does not disclose the penalty, but from an examination of the statute it appears that it was the amount of the debt.

The trial court had instructed the jury that if they were

satisfied beyond a reasonable doubt on the testimony of one witness only, that the answer of the defendant was knowingly and willfully false, it was sufficient to warrant a verdict of guilty. The defendant, on the other hand, had requested the judge to instruct the jury that he could not be proved guilty by the testimony of one witness only, and this was refused.

The court say:

"By reference to the statute it will be found that it is a special action on the case, the gist of which is the false answer under oath of the defendant, knowingly and willfully made in his examination on the trustee process. Upon the proof of this falsity, the right of the plaintiff to recover entirely depends, and if proved, the defendant is rendered liable to consequences which are highly penal."

The court then proceeds to consider the question at greater length than permits of quotation, and the verdict was set aside.

In this Court this rule was long ago recognized.

U. S. v. *The Burdett*, 9 Peters, 682.

Information filed against the brig Burdett, alleging her to have been forfeited to the United States for a violation of the registry acts, she being owned in whole or in part by a subject of the King of Spain. The vessel had been purchased by an agent of Steever, a citizen of the United States, and by him sent to Havana, where she was placed under the direction of one Carrera, a merchant of that place, who directed her voyages, professing to act as Steever's agent. The vessel having been attached, Steever filed a claim in which he alleged that the brig was originally built in North Carolina, purchased by him of the original owner and thereupon registered in his name as sole owner, he being a citizen of the United States, and denied that she

was owned in whole or in part by Carrera or any other foreigner.

The court said, page 690:

"The object of the prosecution against the Burdett is to enforce a forfeiture of the vessel and all that pertains to it for the violation of a revenue law. This prosecution, then, is a highly penal one, and the penalty should not be inflicted unless the infractions of the law shall be established beyond reasonable doubt. That frauds are frequently practiced under the revenue laws can not be doubted, and that individuals who practice these frauds are exceedingly ingenious in resorting to various subterfuges to avoid detection is equally notorious, but such acts can not alter the established rules of evidence which have been adopted as well with reference to the protection of the innocent as the punishment of the guilty."

The court then considers some of the evidence and says:

"These facts and others which are on the record do authorize a suspicion that the vessel was purchased in the name of Steever for the benefit of Carrera, and we think the proceeding instituted by the district attorney in this case was justified from the facts which have been developed.

"But the inquiry now is not whether the prosecution was properly instituted, but whether the evidence makes out a forfeiture in such terms as to require its enforcement by the court.

"Admitting the facts which have been stated as creating suspicion, are they conclusive? * * * No individual should be punished for a violation of a law which inflicts a forfeiture of property unless the offense shall be established beyond a reasonable doubt. This is the rule which governs a jury in all criminal prosecutions, and the rule is no less proper for the government of the court when exercising a maritime jurisdiction.

"After a full and mature examination of the facts in this case, while we admit the acts of declarant are not clear of suspicion, we are forced to the conclusion that the evidence does not authorize a forfeiture of the vessel."

Chaffee v. *U. S.*, 18 Wallace, 516.

Action of debt to recover the penalty prescribed by section 48 of the Revenue Act of June 30, 1864, against the

defendants for having in their possession certain distilled spirits for the purpose of sale, with design to avoid the duties imposed thereon.

The court in considering exceptions taken to the charge to the jury said (page 544):

"These are directed principally to the error which pervades the whole charge, consisting in the instruction reiterated in different forms that after the government had made out a *prima facie* case against the defendants, if the jury believed the defendants had it in their power to explain the matters appearing against them and did not do so, all doubt arising upon such *prima facie* case must be resolved against them. * * * 'In determining, therefore, in the outset,' said the court to the jury, 'whether a case was established by the government, you will dismiss from your minds the perplexing question whether it is so made out beyond all doubt. It need not, in the exigencies of this case be so proved, in order to throw the burden of explanation upon the defendant, if, from the facts you believe he has within his reach that power. In the end, all reasonable doubt must be removed, but here at this stage you need say only, is the case so far established as to call for explanation? * * * If, then, you conclude that unexplained and uncontroverted by any testimony the opening proof would enable you to find against the defendants for the claim of the government or any material part of it, you will then take up their testimony in view of the principle' stated, that of presuming against a party who fails to produce proof in his possession. * * * The purport of all this was to tell the jury that although the defendants must be proved guilty beyond a reasonable doubt, yet, if the government had made out a *prima facie* case against them, not one free from all doubt but one which disclosed circumstances requiring explanation and the defendants did not explain, the perplexing question of their guilt, need not disturb the minds of the jurors. Their silence supplied in the presumptions of the law, that full proof which should dispel all reasonable doubt. In other words, the court instructed the jury, in substance, that the government need only prove that the defendants were presumptively guilty, and the duty thereupon devolved upon them to establish their innocence, and if they did not they were guilty beyond a reasonable doubt. * *

* The instruction sets at naught established principles. Judgment reversed and new trial ordered."

U. S. v. *Shapleigh*, 54 Fed. 126 (4 C. C. A. 237).

Section 5483, Revised Statutes, defines the offense of making a false claim against the government or supporting a claim by false proofs, and provides the punishment of fine and imprisonment for the commission of such offense.

Section 3490 gives the United States a civil action against the offender to recover a forfeiture of $2,000 and double damages.

In this case an action was brought under the latter section. The opinion of the court contains an interesting and careful review of the authorities on the question as to the degree of proof required in such cases, and concludes by affirming the rule to be substantially as we have above stated it.

U. S. v. *Budd*, 144 U. S. 154.

A bill was filed to set aside patents obtained under the provisions of the "Timber and Stone" act of June 3, 1898 (20 Stat. at L. 89). Section 2 of that act contains provisions practically identical with those of section 13 of the Preemption Act of 1841, now under consideration. The patent was issued to Budd, who conveyed to Montgomery. Both were made defendants, and it was sought to annul the patents on these grounds: 1, a combination between defendants to obtain the title for Montgomery; 2, false proofs as to the character of the land.

The particular proposition which we contend for was not presented in that case, but the court, after quoting the language of Mr. Justice Miller in the case of *U. S.* v. *Maxwell Land Grant Co.*, 121 U. S. 325, says:

"This case is even stronger in its aspects than some that have been before us, for if the particular wrong charged

upon the defendants be established, the money paid is by the second section of the act forfeited, and there is not even the possibility suggested in the case of *U. S.* v. *Trinidad Coal Co.*, of an equitable claim upon the government for its subsequent re-payment. The hardship of such a result, so different from that which is always enforced in suits between individuals, makes it imperative that no decree should pass against the defendants unless the wrong be clearly and fully established."

In this same case occurs another expression by the court which, although not directly bearing upon the immediate point now under consideration, is nevertheless of much importance in connection with the general question as to the necessary degree of proof, as discussed by the counsel for the respective parties in their briefs.

Answering a suggestion of counsel as to the existence of certain presumptions of law, and denying their application to that case, the court said at the outset of its discussion of the point:

"The charge is that Budd made a prior agreement with Montgomery. When Budd made his application he filed an affidavit, swearing that he had made no agrement with any one. *This is one denial under oath of the truth of this charge.* In the bill as filed, answers under oath were called for, and Budd and Montgomery each filed an answer under oath denying specifically the existence of any such prior agreement, and an answer under oath in an equity case, when called for, is to be taken as evidence."

The point to which we particularly invite attention here is that in the judgment of the court the very affidavit, the falsity of which is alleged in the bill and must be proved in order to sustain it, is itself to be regarded as evidence for the defendants—a denial under oath of the truth of the charge—and as such to be overcome by proof. *Therefore in the case at bar there are fourteen affidavits—the sworn testimony of fourteen witnesses—denying the truth of the charges in the bill,* lying at the very threshold of the case, in addition to the

sworn answers of the defendants, to be overcome by complainants. This is as though complainant had made all the entrymen parties defendant, called for their answers on oath, and been met by sworn denials of the allegations of the bill.

To return to the proposition immediately under discussion.

Such being the rule as to the degree of proof necessary to establish the case of the government, it will hardly be contended that its requirements are met by the evidence relied upon in the present case. If anything were needed to add emphasis to the propriety of its application in this case it would be supplied by the circumstance so fully considered in the brief of the leading counsel for appellees, that upward of forty years elapsed between the acts complained of and the production of the evidence by which their unlawful character was sought to be established. It ought to be regarded, judicially, as a pretty strenuous task to convict fourteen men of perjury and one of subornation of perjury in the same case after the lapse of forty years. The law governing the prosecution of criminal offenses at that time precluded any attempt to do so after two years.

But it may be urged that this suit is not brought against the original entrymen but against their transferee and that if any forfeiture of the lands is decreed they will not be the sufferers.

The reply seems to us obvious. Stinson is charged to have procured the alleged false proofs to be made, and to have acquired title by means of such false proofs. These entrymen, having conveyed to him by warranty deeds, would have been at least proper parties to suits to set aside their entries and patents (*U. S.* v. *Budd*, *supra*,) though possibly had they all been parties to this suit it would have exposed

the bill to the objection of multifariousness. The specific charge is that they were guilty of perjury and Stinson of subornation of perjury. Why should the government, by merely omitting to make them parties to the proceeding by which it seeks to set aside their entries and patents, escape the necessity of establishing its case by as satisfactory proof as if they were parties? Or, to put it in another way, why should less proof be necessary to fasten upon them the guilt of perjury and to enforce the statutory forfeiture against their transferee in a proceeding to which they are not parties than would be required in a proceeding to which they were parties? The provision that in case of false swearing on the part of the entryman every grant or conveyance of the land made by him shall be void, necessarily brings the grantee within the scope of the act, since it is upon him that the forfeiture must directly operate. The right of the government to enforce the forfeiture depends upon the commission by the entrymen of specific acts of perjury charged in the bill, while in the present case there is superadded the necessity of proving that all was done by Stinson's procurement and we can conceive of no just reason why the rules of evidence should be modified by the omission to bring the entrymen before the court as parties defendant.

The Question of Laches.

Upon this question we desire to call the attention of the court to two statutes, which, we think, have an important bearing upon its determination:

1. We have already endeavored to show that whatever may have been the original intention of counsel for the government in instituting this suit, as to the grounds upon which they would seek the relief prayed for, to wit, that the

patents, certificates and entries of the land, and the patents issued, be delivered up to be canceled, set aside and annulled (Trans. p. 21), as the case actually stands, it must be regarded as brought to enforce the penalty or forfeiture prescribed by section 13 of the act of 1841 for swearing falsely in respect of the matters enumerated in that section.

By Section 1047 of the Revised Statutes it is prescribed:

"No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained * * * unless the same is commenced within five years from the time when the penalty or forfeiture accrued."

At a very early date it was declared by this Court, in construing this statute in its then form, that it applied to civil actions or proceedings for the enforcement of penalties and forfeitures.

Adams v. *Woods*, 2 Cranch, 336.

This was an action of debt *qui tam*, brought to recover a penalty imposed by the act prohibiting the slave trade. The statute being pleaded, a demurrer was filed to the plea and it was contended that the statute only applied to criminal proceedings.

The court said, sustaining the plea:

"In expounding this law it deserves some consideration that if it does not limit actions of debt for penalties, those actions might in many cases be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture."

U. S. v. *Maillard*, 4 Ben. 461.

This was a suit to recover the penalty prescribed by R. S., Sec. 2839, for not invoicing merchandise according to the actual cost at the place of exportation, with design to evade pay-

ment of duties; the penalty being the forfeiture of the merchandise or of the value thereof, to be recovered of the offender. This statute was pleaded as a defense. The government replied:

a That the statute did not apply.

b. That the falsity of the valuation having been fraudulently concealed, the statute did not run until the fraud was discovered. Both of these contentions, however, were overruled by the court. Here, it will be observed, the forfeiture was incurred by swearing falsely to an affidavit for the entry of merchandise for duties. In the case at bar the forfeiture is incurred by swearing falsely to an affidavit for entry of land for patent.

Section 2864 provides in more general terms a similar forfeiture for like offenses.

U. S. v. *Tithing-yards*, 9 Utah, 273.

This was a suit brought by the United States to forfeit certain property acquired and held by the defendants in violation of a statute prohibiting religious corporations from acquiring and holding real estate of a value exceeding $50,000. This statute was pleaded in defense. It appeared that the title to the property had been acquired by the corporation more than five years before suit brought, and it was contended that the statute began to run from the date of such acquisition, but the Supreme Court of Utah held that the prohibition being against acquiring *and holding* and it being conceded that the defendant had continued holding the property at a date within five years before the beginning of the suit, the bar of the statute was not complete.

The foregoing cases are cited to illustrate the applications which have been made of this statute.

2. Section 8 of the act of March 3, 1891, entitled "An

Act to repeal the timber culture laws, and for other purposes" (26 Stat. at L., p. 1093) provides as follows:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

A hasty reading of this statute might convey the impression that this section applied only to entries under the timber culture laws, but a more careful examination will show that it applies also to homestead, desert land and preemption entries.

Without insisting that either of the above quoted statutes can now be urged as a bar to this suit, it is submitted that the evidence which they furnish of the intention of the sovereign to place a limit of five years upon its own right to prosecute suits of this character, where the forfeiture of property is the object sought to be attained, may well be regarded by this court as ample justification for denying the complainant a decree in this case, brought forty years after the issuance of patents. Under neither of these statutes can delay be excused on the ground of the concealment or non-discovery of a cause of action. The limitations imposed by both statutes are absolute, and the court may well accept these legislative limitations as a safe guide in the disposition of this case, especially in view of the very large interests of innocent creditors involved therein.

Respectfully submitted,

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